IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 881 of 2005

For Approval and Signature:

HONOURABLE MR.JUSTICE J.M.PANCHAL
AND
HONOURABLE MR.JUSTICE H.B.ANTANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment?

4 Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the Civil Judge?

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THAKORE SAKARAJI (SAKAJI) KALAJI & 15 - Appellant(s)

Versus

THE STATE OF GUJARAT - Opponent

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Appearance :
MR YF MEHTA for Petitioners
MR KT DAVE, ADDITIONAL PUBLIC PROSECUTOR for Respondent
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CORAM : HONOURABLE MR.JUSTICE J.M.PANCHAL
and
HONOURABLE MR.JUSTICE H.B.ANTANI

Date : 11/08/2005

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE J.M.PANCHAL)

1. Instant appeal filed under Section 374 (2) of the Code of Criminal Procedure, 1973, is directed against

judgment dated April 21, 2005 rendered by the learned Additional Sessions Judge, 3rd Fast Track Court, Mehsana, in Sessions Case No. 226 of 2003, by which all the appellants are convicted under Section 135 of the Bombay Police Act, whereas appellant Nos. 3, 4 and 13 are convicted under Sections 147, 148, 307, 323, 324 read with 149 IPC, and others are convicted under Section 147 and 148 IPC as well as Section 307 read with Section 149 IPC and Sections 324 read with Section 149 IPC as well as Section 323 read with Section 149 IPC; and each sentenced to imprisonment till rising of the Court for commission of offence punishable under Section 135 of the Bombay Police Act, whereas the appellant Nos. 3, 4 and 13 are ordered to be released on probation of good conduct for a period of two years on furnishing Personal Bond in the sum of Rs. 5,000/- (Rupees Five Thousand Only) and each of the other appellants is sentenced to RI for 2 years and fine of Rs.2,000/- (Rupees Two Thousand Only), in default SI for two months for commission of offences punishable under Sections 147 and 148 IPC and RI for 10 years and fine of Rs.5,000/-, in default SI for 10 months for commission of offence punishable under Section 307 read with Section 149 IPC as well as RI for 3 years and fine of Rs.1,500/- (Rupees One Thousand And Five Hundred

Only), in default SI for 2 months for commission of offence punishable under Section 324 read with Section 149 IPC and, also, RI for 1 year and fine of Rs.1,000/- (Rupees One Thousand Only), in default SI for 1 month for commission of offence punishable under Section 323 read with Section 149 IPC. It may be stated that substantive sentences imposed on each appellant except appellants Nos. 3, 4, 13, are ordered to run concurrently.

2. The facts emerging from the record of the case are as under:

The incident in question took place on April 22, 2003 in Village: Karannagar, Taluka: Kadi, District: Mehsana. On the day of incident, the complainant i.e. Baldevji Pujaji Thakore, in the company of Keshaji Veraji, Govindji Keshaji, Udaji Somaji, Prahladbhai Somaji, Ratisinh Somaji, Dasharatji Balaji, etc went in the tractor of Somaji Revaji to offer food to their deity, namely, *Meldimata*, at the temple situated in their field, located in the sim of the village. When they returned home at about 9 P.M., they were accosted and assaulted by the accused. The prosecution-case is that when Baldevji was in tractor, accused No. 15, i.e. Manuji

Gandaji, caused injury on his head and temple by means of a dharia. According to the prosecution, on receipt of injuries, the complainant started bleeding and fell down. What is claimed by the prosecution is that thereafter, rest of the accused started beating Keshaji Veraji, Govindji Keshaji, Ratisinh, Dasharatji, etc. As those who had accompanied the complainant were assaulted, shouts were raised, as a result of which, village people gathered and, therefore, the accused fled the place of incident. The injured were removed to the Community Health Centre, Kadi, for treatment. According to the prosecution, the motive which prompted the appellants to assault the complainant and others was dispute between Thakore Arjanji Somaji and Thakore Govindji Kesaji regarding right of way near boundary of field. The complainant lodged his complained at Community Health Centre itself with Mr. M.J.Desai, who was then PSI of Kadi Police Station. The complaint, which was reduced into writing, was forwarded to PSO of the Police Station for registration of offences. After registration of offences, the same was handed-over to Mr. Desai for investigation. The Investigating Officer drew *panchnama* of the place of incident and recorded statements of those persons who were found to be conversant with the facts of

the case. The accused were arrested and weapons used in commission of crime were seized, which were discovered pursuant to disclosure statements made by them. Incriminating articles seized were sent to FSL for analysis. On completion of investigation, the appellants were charge-sheeted in the Court of learned Judicial Magistrate (First Class), Kadi, on the basis of which, Criminal Case No. 1961 of 2003 was registered against the appellants. As the offence punishable under Section 307 is exclusively triable by a Court of Sessions, the case was committed to the Sessions Court, Mehsana, for trial, where it was numbered as Sessions Case No. 226 of 2003.

3. The learned Additional Sessions Judge, Mehsana, to whom the case was made over for trial, framed necessary charge against the accused at Exh. 36. It was read-over and explained to them. They pleaded not guilty to the same and claimed to be tried. The prosecution, therefore, examined: (1) Dr. Parul Chandrakant Sheth as PW 1, at Exh. 56; (2) Dr. Mustakahmed Gulamrasul Shaikh as PW 2, at Exh. 66; (3) Dr. Gopalbhai Somabhai Makwana as PW 3, at Exh. 69; (4) complainant, Baldevji Pujaji Thakore as PW 4, at Exh. 72; (5) injured, Keshaji Vervaji Thakore as PW 5, at Exh. 75; (6) injured, Ratisinh Somaji

Thakore as PW 6, at Exh. 79; (7) Gopalji Keshaji Thakore as PW 7, at Exh. 80; (8) injured, Fatesinh Somaji Thakore as PW 8, at Exh. 81; (9) injured, Udaji Somaji Thakore as PW 9, at Exh. 82; (10) injured, Motiben Ambarambhai Thakore as PW 10, at Exh. 83; (11) *panch*, Mustufabhai Alikhan as PW 11, at Exh. 84; (12) *panch*, Gandaji Vihaji Thakore as PW 12, at Exh. 86, (13) *panch*, Chanduji Somaji Thakore as PW 13, at Exh. 88; (14) *panch,* Pratapji Shivaji Thakore as PW 14, at Exh. 89; (15) *panch,* Vishnuji Pujaji Thakore as PW 15, at Exh. 92; (16) panch, Bhupendrabhai Iswarlal Joshi as PW 16, at Exh. 93; (17) injured, Govindji Keshaji Thakore as PW 17, at Exh. 96; (18)injured, Dashrathji Babuji Thakore as PW 18, at Exh. 113; and (19) Investigating Officer, PSI Mr. M. J. Desai, as PW 19, at Exh. 114, to prove its case against the appellants. The prosecution also produced documentary evidence such as certificates of injuries sustained by injured witnesses, *panchnama* of place of incident; *panchnama,* indicating discovery of weapons, pursuant to disclosure statements made by the accused; FSL Report, etc. in support of its case against the appellants.

4. After recording of evidence of prosecution witnesses

was over, the learned Judge explained to the appellants, the circumstances appearing against them in the evidence of prosecution witnesses and recorded their further statements, as required by Section 313 of the Code of Criminal Procedure, 1973. In further statement, the case of each appellant was that he had not caused any injury to the injured, as claimed by the prosecution and that a false case was foisted upon him. However, no defence evidence was adduced by any of the appellants.

5. On appreciation of evidence adduced by the prosecution, the learned Judge held that in view of the fact that accused, Arjanji Thakore, was scolded by Govindji with regard to damage to hedge, the appellants had formed unlawful assembly and armed themselves with different weapons, such as, sword, dharia, etc, as a result of which, commission of offences punishable under Sections 147, 148 read with Section 149 IPC was established. The learned Judge further held that it was proved by the prosecution that the appellant No.15 i.e. Manuji Gandaji as well as appellant No. 11 i.e. Ramanji Gandaji and appellant No. 7 i.e. Chhanaji Jethaji, were armed with dharias whereas appellant No. 2 Jayantiji Ghabhaji, was armed with sword, and they attempted to

commit murder of witness, Govindji, whereas appellant No.12, Arjanji Somaji, gave blows with stick on head and back of Govindji and caused injury by stick on his back, and appellant No. 14 i.e. Gandaji Joitaji, who was armed with stick and appellant No. 4 i.e. Amaratji Chhanaji caused injuries to Govindji, and, therefore, commission of offences punishable under Sections 307, 324, 323 read with Section 149 IPC was established. The learned Judge concluded that it was proved by the prosecution that in an attempt to murder Keshaji Vervaji Thakore, appellant No. 16 i.e. Kalaji Somaji caused injury with dharia on his head whereas appellant No. 2 i.e. Jayantiji Ghabhaji, caused injury on finger of his left-hand by means of a sword, and appellant No. 6 i.e. Kantiji Prahladji, and appellant No. 7 i.e. Chhanaji Jethaji as well as appellant No. 10 i.e. Rameshji Chhanaji caused injury to him by means of dharia, sticks, etc. and, therefore, commission of offences punishable under Sections 307, 324, 323 read with Section 149 IPC was also established. According to the learned Judge, the complainant i.e. Baldevji Pujaji was assaulted by means of dharia, by accused No. 15 i.e. Manuji Gandaji and, therefore, commission of offence punishable under Section 324 read with Section 149 IPC was established. The learned Judge

further deduced that appellant No. 6 i.e. Kantiji Prahladji Dashrathji caused injury on palm of right hand by means of a danti to Ratisinh @ Revaji Somaji whereas appellant No. 2 i.e. Jayantiji Ghabhaji caused injury to Ratisinh on his head and temple by means of sword and appellant No. 12 i.e. Arjanji Somaji caused injury to him by means of a stick and, therefore, commission of offences punishable under Sections 324, 323 read with 149 IPC was proved. The learned Judge concluded that witness, Udaji Somaji Thakore, was assaulted by appellant No. 7 i.e. Chhanaji Jethaji, whereas appellant No. 12 i.e. Arjanji Somaji assaulted him by means of a stick, and witness Fatehsinh Somaji was assaulted by appellant No. 1 i.e. Sakaraji Kalaji by means of dharia whereas appellant No. 8 i.e. Ashokji Chhanaji assaulted witness Fatesinh by dharia which landed on his left shoulder, whereas appellant No. 3 i.e. Somaji Sakaraji assaulted him by means of stick and appellant No. 13 i.e. Sardarji Channaji by means of danti whereas appellant No. 7 i.e. Chhanaji Jethaji assaulted him by means of a club and, therefore, commission of offences punishable under Sections 307, 323, 324 read with Section 149 IPC was also established. According to the learned Judge, it was not proved by the prosecution that appellant No. 10 i.e.

Rameshji Chhanaji threw stones and, therefore, commission of offence by the accused punishable under Sections 337 read with Section 149 IPC was not established. The learned Judge also held that it was not proved by the prosecution that offence punishable under Section 504 read with Section 149 IPC was committed by any of the accused. However, the learned Judge held that the appellants had armed themselves with different weapons in breach of notification issued by District Magistrate, Mehsana, under Section 37 (1) of the Bombay Police Act and had, therefore, committed offence punishable under Section 135 of the Bombay Police Act. In view of abovereferredto conclusions, the learned Judge has convicted the appellants under Sections 147, 148, 149, 323, 324, 307 IPC read with Section 149 IPC and Section 135 of the Bombay Police Act and imposed sentences enumerated earlier, by judgment dated April 21, 2005, giving rise to instant appeal.

6. Mr. Y.F. Mehta, learned Counsel of the appellants, contended that the evidence on record indicates that there was free fight and / or mutual fight between the appellants and prosecution witness, as a result of which, the learned Judge of the Trial Court was not justified in

invoking provisions of Section 149 IPC to the facts of the case. It was argued that appellants Nos. 1, 2, 9, 14, 15 and 16 sustained bleeding injuries, which are not explained by any of the prosecution witnesses and as genesis of the incident in question is suppressed by the prosecution, the appellants are entitled to acquittal. It was argued that non-explanation of injuries sustained by the appellants should prompt the Court to draw the inferences, as stated by the Supreme Court in **Lakshmi Singh and Others Vs. State of Bihar, AIR 1976 SC 2263,** and that the appellants should be acquitted, more particularly when it probabalises the case of each appellant that he is falsely involved in the case. The learned Counsel emphasised that perusal of testimony given by each injured witness makes it evident that he is not supported by medical evidence regarding his own injuries and, therefore, the judgment impugned deserves to be set aside. What was maintained by the learned Counsel of the appellants was that the evidence on record has been completely misread by the learned Judge of the trial court and, therefore, the appeal should be allowed.

7. Mr. K. T. Dave, learned Additional Public Prosecutor for the State, argued that injured witnesses would not

allow the real culprits to go scot-free and involve innocent persons falsely, as a result of which, well-founded conviction of the appellants based on the testimony of injured witnesses should be upheld by this Court. The learned Additional Public Prosecutor pointed out to the Court that non-explanation of injuries on the facts and in the circumstances of the case cannot be regarded as having vitiating effect on the prosecution case and, therefore, the plea based on non-explanation of injuries should not be accepted by the Court. It was argued by the learned Additional Public Prosecutor that to some extent, the injured witnesses stand corroborated by medical evidence on record, and, therefore, no benefit of doubt should be given to any of the appellants, as is sought to be claimed by the learned Counsel of the appellants. The learned Additional Public Prosecutor for the State asserted that cogent and convincing reasons have been assigned by the learned Judge of the Trial Court, who had advantage of observing demeanour of the witnesses, for convicting the appellants, and as the learned Counsel of the appellants has failed to dislodge those weighty reasons, the appeal, which lacks merits, should be dismissed.

8. It may be mentioned that pursuant to direction contained in order dated August 3, 2005, the learned Counsel of the appellants has submitted paper-book for perusal of the Court. This Court has heard Mr. Y.F. Mehta, learned Counsel of the appellants as well as Mr. K.T. Dave, learned Additional Public Prosecutor for the State, at length and in great detail. This Court has also undertaken a complete and comprehensive appreciation of all vital features of the case and the entire evidence on record with reference to broad and reasonable probabilities of the case.

9. In order to ascertain whether there was free and / or mutual fight between the appellants and injured, it would be relevant to notice testimony of Dr. Parul Chandrakant Sheth, recorded at Exh. 56. The Doctor, has in paragraph-1 of her testimony, in terms stated that injured Govindji Keshaji Thakore had come to Community Health Centre without *Police Yadi* and informed her that he had received injuries in a brawl. Similarly, her testimony indicates that Thakore Keshaji Vervaji, who had approached her without *Police Yadi*, had given history of assault as mutual fight. Her testimony further shows that similar history of assault was stated by injured Thakore Baldevji Pujaji, Thakore Ratisinh Somaji, Thakore

Udaji Somaji, Thakore Motiben Ambarambhai, etc. This is evident if one peruses what is stated by the Doctor in paragraphs 3 to 7 of her testimony. Further, answer given in cross-examination by injured Keshaji Vervaji Thakore, examined at Exh. 75, makes it very evident that mutual fight had taken place between two groups and that the same had continued till arrival of police at the place of incident. The evidence of most of the injured witnesses establishes that appellant Nos. 1, 2, 9, 14, 15 and 16 were injured in the incident in question. The appellant Nos. 1, 2, 9, 14, 15 and 16 would not have received injuries if free and / or mutual fight had not taken place between the two groups. What is relevant to notice is that Investigating Officer Mr. M. J. Desai, in his testimony recorded at Exh. 114, has in terms, stated that *inter se* fight had taken place between the members of Thakore Community and that those who were injured, belonged to two different groups, and were removed to Community Health Centre for treatment in one tractor. This fact is stated by the Investigating Officer in the introductory part of his testimony. Thus, there is no manner of doubt that a free and / or mutual fight had taken place between two groups of Thakore Community on the day of incident.

The question, therefore, which arises for consideration of this Court, is whether the learned Judge of the Trial Court, was justified in invoking provisions of Section 149 IPC to the facts of the case. In **Kanwarlal and Another Vs. State of M. P., AIR 2002 SC 3690,** the Supreme Court has authoritatively ruled that in a case of free fight, conviction by recourse to Section 149 is not permissible. What is laid down therein is that unless it is shown that a particular accused caused injuries, he cannot be convicted with the aid of Section 149 IPC. In the said case, free fight had taken place between the accused-party and the deceased party for quite some time. One of the accused fired gunshots causing instantaneous death of the deceased. As it was a case of free fight, the Supreme Court has held that conviction by recourse to Section 149 was not permissible. The Supreme Court further found that shot was fired under sudden and grave provocation during the fight and, therefore, the accused was guilty under Section 304 Part II IPC, but remaining accused, who had not played any role at all, were not liable to be convicted with the aid of Section 149 IPC. Applying the principle laid down by the Supreme Court in abovequoted decision, to the facts of case on hand, this Court finds that this is a case of free fight between the accused

party and the injured. Under the circumstances, recourse to Section 149 was not permissible. Therefore, the conviction of the appellants recorded with the aid of Section 149 is liable to be set aside.

Once the Court comes to the conclusion that recourse to Section 149 IPC is not permissible, the Court will have to find out whether it is shown that a particular accused caused injuries to particular injured witness/es. Unless and until it is shown that a particular accused caused injuries to a particular injured witness, he cannot be convicted.

Before ascertaining as to which appellant caused injury to whom, it would be relevant to notice the glaring feature appearing in the case on hand. The testimony of Dr. Parul Chandrakant Sheth makes it amply clear that appellant Nos. 1, 2, 14, 15 and 16 were examined and treated by her and that all of them had sustained bleeding injuries. What is mentioned by the Doctor in her testimony is that those injuries were visible. The fact that some of the appellants were injured and had gone to Community Health Centre for treatment is admitted by complainant Baldevji Pujaji Thakore, examined at Exh. 72, in his cross-examination by

the defence. Injured Keshaji Vervaji Thakore, in his testimony recorded at Exh. 75, has stated that he had not seen the injuries sustained by the accused but he had to admit the fact that he and his family members were being prosecuted for assaulting the accused. Witness Ratisinh Somaji Thakore has admitted in his cross-examination that he was one of the accused in cross-case, wherein others were also being prosecuted for assaulting the accused. Witness Udaji Somaji Thakore has declined to offer any explanation regarding injuries sustained by the accused.

In view of evidence tendered by prosecution, this Court is of the opinion that the principles laid down by the Supreme Court in **Lakshmi Singh and Others** ***(supra)*** would apply to the facts of the case and it would be reasonable to draw the following inferences:

(i) that the prosecution has suppressed the genesis and origin of the occurrence and has, thus, not presented the true version;

(ii) that the witnesses who have denied the presence of the injuries on the person of the accused are lying on a most material point and, therefore, their evidence is unreliable; and,

(iii) that in case there is defence version which explains the injuries on the person of the accused, it is

rendered probable so as to throw doubt on the prosecution-case.

Again, in **Rukma (Smt) and Others Vs. Jala and Others, (1997) 11 SCC 579,** injuries were received by six accused during the incident. It was found that injuries received by two of them were not minor. It was noticed that there was denial by injured witnesses to have caused any injury to any of the accused, and that it was flatly denied by them that they had weapons with them at the time of incident. On the facts and in the circumstances of the said case, the Supreme Court has held that the High Court was justified in not placing reliance on such witnesses and possibility of innocent persons being roped in was not ruled out. Coming to the facts of the case on hand, though this Court finds that as many as six appellants had received bleeding injuries, which were visible, the injured witnesses have denied to have caused any injury to any of these appellants. They have also flatly denied that they had weapons with them at the place of incident. On the facts and in circumstances of the case, this Court is of the opinion that it would not be prudent to place reliance on such witnesses for the purpose of fastening criminal liability on the appellants because genesis of the incident is suppressed and

possibility of innocent persons being roped in is not ruled out at all.

10. However, this Court does not propose to throw the prosecution-case overboard only on the ground that genesis of the incident is suppressed by the prosecution because the injuries sustained by some of the appellants are not explained and that it is not prudent to place reliance on evidence of the injured witnesses. This Court proposes to scrutinise the evidence of each injured witness to ascertain whether any case is made out by him with reference to injuries sustained by him against any of the appellant / appellants.

Coming to the testimony of injured complainant Baldevji Pujaji, this Court finds that he has stated that he was inflicted two dharia blows on his head by Manuji Gandaji, who is appellant No. 15. However, the medical evidence tendered by Dr. Parul Sheth, recorded at Exh. 56, makes it evident that complainant Baldevji had sustained one Contused Lacerated Wound (CLW) on head and incised wound on forehead. If he had been inflicted two blows by appellant No. 15 with dharia, he would not have sustained CLW. Therefore, his claim that two blows were inflicted on him by appellant No. 15 with dharia, does

not inspire confidence of the Court and is liable to be disbelieved, more particularly, when incident had taken place during night time and there was *inter se* fight between two groups. Having noticed that complainant Baldevji does not stand fully corroborated by medical evidence on record with reference to his own injuries, it is relevant to notice his assertion that he was assaulted when he was sitting in the tractor. Complainant Baldevji has stated in his testimony that no blood was found in the tractor at all, which makes his claim, that he was assaulted when he was sitting in tractor, highly doubtful, because had he been assaulted while he was sitting in the tractor, blood trails would have been found in the tractor. What is relevant to notice is that, on his own say, police had arrived at the place of incident at about 9.30 P.M., but he had not given any complaint at that time and had preferred to lodge his complaint only when he was taken to Community Health Centre along with appellants for treatment. Further, the complainant has approached Dr. Parul Sheth, without *Police Yadi* for treatment of his injuries but not mentioned names of any of the appellants as assailants at all. This is quite evident if one peruses para-3 of her testimony. His evidence makes it further clear that he had informed the police about the incident on phone.

However, his evidence does not make it clear that he had conveyed names of the accused when necessary information about the incident was conveyed by him to the police on phone. In fact, he has stated in terms that he had not disclosed names of any of the accused when information was conveyed by him to the police on phone, because at that time, he was not knowing names of the accused. It means that he had given the complaint after deliberation and named certain appellants as accused. It was suggested to the witness that he had not mentioned names of Ramanji Gandaji i.e. appellant No. 11, Rameshji Chhanaji i.e. appellant No. 10, Kantiji Prahladji i.e. appellant No. 6, Somaji Sakaraji i.e. appellant No. 3, Dashrathji Vechatji i.e. appellant No. 5 and Gopalji Keshaji, as accused in his complaint and this suggestion is denied by him. However, the complaint which is brought on record of the case at Exh. 73, read with the testimony of Investigating Officer, makes it clear that abovenamed appellants were not named in the complaint at all. In view of these basic deficiencies, which are evident from the testimony of complainant Baldevji, it would not be safe and prudent to accept his assertion before the Court that he was assaulted by appellant No. 15 with dharia and that two injuries were caused to him by the said appellant. Thus, the case against appellant

No. 15, as sought to be made out by complainant Baldevji, is liable to be disbelieved.

Coming to the testimony of another injured witness Keshaji Vervaji, whose testimony is recorded at Exh. 75, this Court finds that according to him, appellant No. 2 had assaulted him by sword whereas appellant No. 16 i.e. Kalaji Somaji had assaulted him with dharia, and appellant No. 6 i.e. Kantiji Prahladji had assaulted him with stick. However, the testimony of Dr. Parul Sheth establishes beyond reasonable doubt that injured Keshaji Vervaji had sustained CLW on head and incised wound on one of the fingers on left hand as well as CLW on leg and incised wound on top of another finger of left hand. As per the say of this witness himself, as many as four appellants had assaulted him with sharp cutting instruments. If that had been true, he would not have received incised wound on the fingers and would have received serious injuries on different parts of his body. Therefore, his testimony deserves close scrutiny. The witness, in his cross-examination, has stated that the incident of free fight *inter se* had continued till arrival of police at the place of incident and that members belonging to his party were rescued by the police. What is relevant to notice is that it was put to

witness that he had not stated in his Police Statement that he was assaulted with dharia by Kantiji Prahladji i.e. appellant No. 6 or that by accused Chhanaji Jethaji i.e. appellant No. 7 and accused Rameshji Chhanaji i.e. appellant No. 10 had assaulted him with dharia and stick, respectively. However, the contradiction is brought on record during the course of recording of testimony of Investigating Officer. The Investigating Officer, has in terms stated, that it was not mentioned by injured Keshaji Vervaji Thakore in his Police Statement that he was assaulted with dharia by Kantiji Prahladji or by dharia and stick by Chhanaji Jethaji and Rameshji Chhanaji, respectively. In view of material improvements made during the course of tendering evidence, false implication of innocent persons is not ruled out and it would not be safe to rely upon testimony of this witness for the purpose of fastening criminal liability on appellant Nos. 2, 6, 7, 10 and 16 for his own injuries.

Coming to testimony of witness Ratisinh Somaji, this Court finds that according to him, he was assaulted with sword by Jayantiji Ghabhaji i.e. appellant No. 2 whereas appellant No. 12 i.e. Arjanji Somaji had assaulted him with stick and Kantiji Prahladji i.e. appellant No. 6 had assaulted him by means of a danti. However, the medical

evidence shows that he had received only one injury on his forehead. Thus, it is difficult to conclude that this witness stands corroborated by medical evidence on record. The cross-examination of this witness would indicate that he was prosecuted in cross-case. This witness has not given any explanation regarding injuries sustained by any of the appellants. Under the circumstances, this Court is of the opinion that it is not safe to place reliance on the evidence of this witness for the purpose of coming to the conclusion that he was injured either by the appellant No. 2 or appellant No. 6 or appellant No. 12.

The scrutiny of evidence led by Fatehsinh Somaji, recorded at Exh. 81, makes it evident that according to him, he was assaulted with dharia by Sakaraji Kalaji i.e. appellant No. 1, and as he had attempted to ward off dharia blow on his head by Ashokji Chhanaji, the same had landed on his shoulder whereas he was assaulted with stick by Somaji Sakaraji i.e. appellant No. 3. However, the medical evidence shows that he had received one CLW on head. This witness also does not stand corroborated by medical evidence on record and no reliance can be placed on his testimony for the purpose of holding the appellant No. 1 or appellant No. 8 or appellant No. 3

guilty. Further, he has admitted in his testimony that he had not mentioned in his Police Statement that Keshaji had given blow on his head whereas Jayantiji had given blow on head by means of a sword and that Jayantiji Gabaji had given blow with sword on head of Govindji or that Kantiji had given dharia blow to Ragaji Somaji or Jayantiji Ghabhaji had given sword-blow to Ragaji, etc. A glance at the testimony of this witness makes it very evident that he has made several material improvements and / or embellishments in his testimony before the Court, obviously, because, he was also one of the accused, who was prosecuted in the cross-case, and, therefore, it is not prudent to place reliance on his testimony for convicting the appellants named by him.

The testimony of injured Udaji Somaji Thakore is recorded at Exh. 82. According to him, he was injured with dharia by Chhanaji Jethaji i.e. appellant No. 7. However, the medical evidence of Dr. Parul Sheth establishes that he had sustained CLW on hand and also on forehead. If he had been assaulted with dharia, he would have received an incised wound. The Supreme Court has explained in **Hallu And Ors. Vs. State of Madhya Pradesh, AIR 1974 SC 1936** that normally when a witness says that an axe or sphere is used, there is no warrant for

supposing that what the witness means is that blunt side of weapon was used. What is explained by the Supreme Court is that if that be the implication, it is the duty of the prosecution to obtain a clarification from the witness as to whether a sharp-edged or a piercing instrument was used as a blunt weapon. The facts of the case indicate that no clarification was obtained from the witness that sharp edged weapon i.e. dharia was used as a blunt weapon. As witness Udaji Somaji has not sustained any incised wound, he will have to be regarded as unreliable in view of medical evidence on record. Further, his cross-examination makes it very that he had not mentioned names of Chhanaji Jethaji, Rameshji Chhanaji, Ramanji Gandaji, Amaratji Chhanaji, Ashokji Chhanaji, Kantiji Prahladji, as accused in his Police Statement nor it was stated by him in his Police Statement that appellant No. 7 had caused dharia-injury on him. This contradiction stands proved by the testimony of Investigating Officer, Mr. Desai. Under the circumstances, no case is made out by this witness against appellant No. 7.

Coming to the testimony of Motiben Ambarambhai, which is recorded at Exh. 83, this Court finds that according to her, she was injured with danti by appellant

No. 13 whereas appellant No. 4 had assaulted her with a stick and appellant No. 7 had thrown a club at her. However, the medical evidence of Dr. Parul Sheth makes it evident that she had not received any external injury and she was complaining of pain. Thus, this witness does not stand corroborated by medical evidence on record at all. Moreover, she has admitted that it was not stated by her in her Police Statement that appellant Jayantiji had inflicted sword-blow on head of injured Gowaji or that Jayantiji had also inflicted sword blow to Ragaji or that appellant Channaji had given danti-blow to Keshaji Vervaji. In view of material contradictions, which have been proved by the defence, this Court is of the opinion that it is not safe to place reliance on her testimony for the purpose of fastening criminal liability on appellant Nos. 7 and 13.

Again, a perusal of testimony of Govindji Keshaji Thakore, recorded at Exh. 96, makes it evident that it is his case that he was injured with sword by appellant No. 2, whereas appellant No. 7 caused dharia-injury to him and appellant No. 6 also caused dharia-injury to him whereas appellant No. 15 caused dharia-injury to him and appellant No. 12 i.e. Arjanji Somaji and No. 14 i.e. Gandaji Joitaji caused injury to him by means of stick

whereas appellant No. 4 i.e. Amaratji Chhanaji caused injuries to him by means of danti. What is relevant to notice is that as per the say of Dr. Parul Sheth, who had examined this witness, he had received two injuries, i.e. one CLW and another incised wound on forehead. If this witness had been assaulted with dangerous weapons like dharia and danti by as many as five appellants, he would not have received only one incised wound, but would have received several serious injuries. Under the circumstances, his claim before the Court becomes highly doubtful. Further, it was put to the witness that it was not stated by him in his Police Statement that he was assaulted with dharia by Chhanaji Jethaji i.e. appellant No. 7 or that he was assaulted with dharia by Kantiji Prahladji or that by stick by Arjanji Somaji or with danti by Amaratji Chhanaji. However, these omissions stand proved by the testimony of Investigating Officer Mr. Desai. A fair reading of testimony of Investigating Officer makes it very clear that this witness has made several material improvement and embellishments to suit his purpose, as result of which, tendency on his part to involve innocent persons falsely has become evident. This witness also, therefore, cannot be believed in support of prosecution case against the appellants.

The scrutiny of testimony of injured Dashratji Pujaji Thakore indicates that it was his claim that he was assaulted with stick by Arjanji i.e. appellant No. 12 and with dharia by Chhanaji i.e. appellant No. 7. The evidence of Dr. Parul Sheth would indicate that he had taken treatment as an outdoor patient and no injury was sustained by him nor noticed by her. Thus, the medical evidence on record shows that this witness has tendency to exaggerate and involve innocent persons falsely. Further, his cross-examination indicates that it was stated by him in his Police Statement that a stick-blow was delivered to him on his back by appellant No.12 Arjanji. On the facts and in the circumstances of the case, this Court is of the opinion that no reliance can be placed on the testimony of this witness for coming to the conclusion that that he was assaulted by the two appellants named by him.

The net result of above discussion is that the prosecution has suppressed the genesis and origin of the occurrence of incident and has thus, not presented a true version. The injured witnesses, who have denied the presence of the injuries on the person of the appellants, are lying on a most material point, and therefore, their evidence is unreliable. None of the injured witnesses is

found to be reliable even with reference to injuries sustained by him. Material improvements made by the witnesses and very important contradictions brought on record by the defence unerringly establishes that the witnesses have tendency to involve innocent persons falsely. These material features appearing from the record of the case have been totally ignored by the learned Judge of the Trial Court. Therefore, the appeal deserves to be accepted.

11. For the foregoing reasons, the appeal succeeds. Judgment dated April 21, 2005 rendered by the learned Additional Sessions Judge, 3rd Fast Track Court, Mehsana in Sessions Case No. 226 of 2003, convicting the appellants under Sections 147, 148, 323, 324, 307 read with 149 IPC as well as Section 135 of the Bombay Police Act and sentencing them to different punishments enumerated therein, is hereby set aside. Instead, the appellants are acquitted. The respondent shall forthwith set at liberty all the appellants, unless presence of all or any of them in jail is needed with reference to any other case. Fine, if paid, be refunded to the appellants. The *muddamal* be disposed of in terms of the directions issued by the learned Judge of the trial Court in the impugned judgment.

[J. M. PANCHAL, J.]

[H. B. ANTANI, J.]

/shamnath